INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 320

GEORGE B. PARR, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE B. PARR, PETITIONER

v.

BEN H. RICE, DISTRICT JUDGE

No. 202 Misc.

GEORGE B. PARR, PETITIONER

v.

BEN H. RICE, DISTRICT JUDGE

GEORGE B. PARR, PETITIONER

v.

JAMES V. ALLRED, DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ON MOTION FOR LEAVE TO FILE AND PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court for the Southern District of Texas transferring the case from Corpus Christi to Laredo (R. 16–35; Pet. App. 1–13), the oral opinion of that court granting the Government's motion to dismiss the indictment (R. 159–163; Pet. App. 13–15), and the opinions in the Court of Appeals (Pet. App. 16–36) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1955. (R. 272.) The petition for a writ of certiorari was filed on August 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1) and Section 1651.

QUESTIONS PRESENTED

1. Whether the order of the Federal District Court for the Southern District of Texas granting the Government leave to dismiss petitioner's indictment is appealable.

2. Whether there is cause for issuance of the writs of mandamus and prohibition, where, after the defendant's motion for change of venue has been granted, the United States Attorney obtains a second valid indictment in another district, and then dismisses the original indictment with leave of court after a full and fair statement of his reasons for so doing.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

18 U. S. C.:

SEC. 3237. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or

foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

Federal Rules of Criminal Procedure:

RULE 21. *Transfer from the District or Division for Trial.*

(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) *Proceedings on Transfer.* When a transfer is ordered, the clerk shall transmit to the clerk of the court to which the pro-

ceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

RULE 48. *Dismissal.*

(a) *By Attorney for Government.* The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

* * * * *

STATEMENT

On November 15, 1954, an indictment was returned against petitioner in the Corpus Christi Division of the United States District Court for the Southern District of Texas charging him with wilful attempted evasion of his income taxes by means of affirmative acts committed in that district. (R. 4.) On April 27, 1955, Judge Kennerly ordered the case transferred to the Laredo Division of the Southern District because of prejudice existing in the Corpus Christi area. (R. 16–35.) In making application for this transfer, petitioner specifically refused to waive his constitutional privilege to be tried in the district wherein the crime was alleged to have been committed, and requested transfer only to Laredo. The Government objected to the requested transfer on the ground that it would be

severely handicapped by trial in Laredo (R. 33–35), but stated that it would have no objection to transfer to Houston, Galveston or Victoria. (R. 58.)

On May 3, 1955, a second indictment was returned in the Austin Division of the Western District of Texas, charging petitioner with wilful attempted tax evasion by filing false and fraudulent income tax returns at Austin, Texas. (R. 37.) The first and second indictments covered the same offenses; the allegations of specific acts committed in the carrying out of the offenses were different.

On May 4, 1955, the United States Attorney filed a motion to dismiss the original indictment in the Southern District under Rule 48 (a) of the Federal Rules of Criminal Procedure. (R. 35–36.) On May 16, 1955, Judge Kennerly, who had ordered the transfer to Laredo, heard argument on the motion to dismiss (R. 81–159) and dismissed the indictment (R. 159–166). The Government, in the course of presenting its argument to Judge Kennerly on the proposed dismissal, explicitly stated that one of the paramount factors underlying the new indictment in the Western District and the request for dismissal in the Southern District was the Government's apprehension that it would be handicapped by a trial in Laredo (R. 42–44, 48, 92–96, 114–116), the seat of petitioner's political power (R. 29–30, 34, 93; Pet. 6). In his oral opinion Judge Kennerly re-

ferred to his previous decision transferring the case from Corpus Christi to Laredo and said (Pet. App. 13–14):

> In reaching that conclusion, or rather in examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.
>
> But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. As you all know, we have in the state courts of Texas a practice by which the judge sometimes of his own motion sends a case here, there and elsewhere. There is no such provision in the federal statutes, and I found, as I understand the law, that I had no authority to transfer the case out of the Southern District of Texas. If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.
>
> But as stated, I could not do that as I understand the law.

Petitioner appealed from the order of dismissal (R. 167), and also moved in the District Court for the Western District for a stay of all proceedings in that court pending the appeal, for dismissal of the second indictment, and for an order under Rule 21 (b) transferring the indictment back to Laredo or to Corpus Christi (R. 245–257). These motions were denied. Petitioner thereupon sought writs of prohibition and mandamus in the United States Court of Appeals for the Fifth Circuit to order the District Court for the Western District to vacate its order setting the second indictment for trial, to prohibit that court from exercising jurisdiction, and to stay all further proceedings there. (R. 253–255.)

The Government moved to dismiss the appeal (R. 184) and opposed the issuance of the writs (R. 258–270). The Court of Appeals, with Judge Cameron dissenting, dismissed the appeal and refused to grant the writs. (Pet. App. 16–36.)

ARGUMENT

1. The court below dismissed petitioner's appeal from the dismissal of the original indictment in the Southern District on the ground that the order complained of was interlocutory and non-appealable. (Pet. App. 17–21.) Petitioner does not attack this ruling with much conviction (Pet. 22–23); nor can he, for he is caught on the horns of a dilemma. If the order of dismissal be considered as the disposition of a separate case, without regard to the second indictment in the Western District, it constitutes the termination of

a case in which petitioner has not been aggrieved, and he cannot appeal. *Lewis* v. *United States,* 216 U. S. 611, 612. If, on the other hand, the dismissal be viewed in conjunction with the second indictment, then the order of the Southern District is clearly not a final order, but simply an intermediate step in the criminal proceeding, a proceeding which can only be made final for purposes of appeal by the conviction and sentencing of petitioner. *Berman* v. *United States,* 302 U. S. 211, 212–213; *Cobbledick* v. *United States,* 309 U. S. 323, 324–327; *Heike* v. *United States,* 217 U. S. 423, 429–430. It is clear, therefore, that the appeal from the order of the Southern District dismissing the indictment was properly dismissed by the court below.

2. In urging the issuance of the prerogative writs petitioner contends (Pet. 19–21) that Judge Kennerly failed to exercise the discretionary power over the dismissal of an indictment committed to the District Court under the provisions of Rule 48 (a) of the Federal Rules of Criminal Procedure (*supra,* p. 5), which permits a United States Attorney to dismiss an indictment prior to trial "by leave of court." But it is clear from the record that Judge Kennerly did exercise his discretion in granting the United States Attorney's request. Although the prosecutor argued that petitioner had no standing to object to the requested dismissal (R. 44), Judge Kennerly listened to extensive argument and even

permitted defense counsel to call the United States Attorney as a witness to state his reasons for the dismissal of the indictment (R. 86–159). Judge Kennerly was well aware of the problems which would confront the Government if trial were had at Laredo, for he had heard the Government's original objections on that score in connection with the motion for a change of venue from Corpus Christi to Laredo (R. 33–35). And the prosecutor frankly stated (*supra*, p. 6) that he desired the dismissal in the Southern District because of this difficulty in Laredo. After listening to long argument by both sides, Judge Kennerly stated that, at the time when he had transferred the case from Corpus Christi to Laredo, he had felt that it would be more in the interests of justice that the matter be tried in some other locality outside the Southern District, but that he had been powerless to transfer the case outside that district under the terms of petitioner's motion for a transfer to Laredo.[1] (*Supra*, pp. 6–7.) He then granted leave to dismiss the indictment. He was not giving mere passive approval, as petitioner asserts (Pet. 21), to the United States Attorney's request. He obviously approved it as the wisest course under the circumstances, and one which he would have adopted earlier himself had he considered himself free to do so. Petitioner's contention that he failed to exercise his discretion is without merit.

[1] As noted, *supra*, p. 5, petitioner requested transfer only to Laredo and no other place.

Furthermore, the issuance of the prerogative writs by this Court and by the Courts of Appeals is restricted to those cases in which the writ is necessary to protect appellate jurisdiction. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25. No such necessity exists here. Petitioner contends (Pet. 13–19) that the provisions of Rule 21 (c), *supra*, pp. 4–5, require that the trial be held only in Laredo.[2] But, as petitioner himself points out (Pet. 10, 24), this question has already been raised on the record in the Western District. Petitioner moved in that court that the prosecution under the second indictment be transferred from Austin in the Western District to either Corpus Christi or Laredo in the Southern District under Rule 21 (b), *supra*, p. 4, which would permit such transfer "in the interest of justice." If petitioner were actually entitled to trial in Laredo, the judge in the Western District would certainly have been required to grant the motion and transfer the case back to the Southern District. The issue is preserved, therefore, in the record of the pending proceeding in the Western District. Petitioner has his remedy by appeal and there is no necessity for issuance of the extraordinary writs. There is nothing to indicate that petitioner will be unfairly prejudiced by a

[2] On its merits, the contention is, in our view, clearly unsubstantial. Rule 21 (c) nowhere expresses or implies a limitation on Rule 48 so as to compel at all events continued prosecution of an indictment which the latter rule explicitly states "shall * * * terminate" upon the filing of a dismissal by the Attorney General or a United States Attorney by leave of the court.

trial in the Western District—indeed, Judge Kennerly found that it would be more fair to both parties that the case be tried elsewhere than in the Southern District—and the inconvenience of being required to undergo trial in advance of an appellate decision on the propriety of the pretrial proceedings clearly presents no basis for mandamus or prohibition. *Roche* v. *Evaporated Milk Assn., supra,* pp. 30–31; see also Rule 30 of the Revised Rules of this Court.

CONCLUSION

The court below was clearly correct in dismissing the appeal and no reason has been presented for issuance of the prerogative writs. The petitions for certiorari and for mandamus and prohibition should be denied.

Respectfully submitted,

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SEPTEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955